

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

NORTHWEST HOME DESIGNING,  
INC.,

Plaintiff,

v.

BENJAMIN RYAN COMMUNITIES,  
LLC, and JOHN RYAN BAYS,

Defendants.

CASE NO. C14-5808BHS

ORDER GRANTING  
PLAINTIFF'S MOTIONS FOR  
LEAVE TO AMEND

This matter comes before the Court on Plaintiff Northwest Home Designing, Inc.'s ("Northwest") motion for leave to file second amended complaint (Dkt. 58) and supplemental motion for leave to file second amended complaint (Dkt. 78). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby grants the motions for the reasons stated herein.

**I. PROCEDURAL HISTORY**

On October 10, 2014, Northwest filed a complaint against Defendant Benjamin Ryan Communities, LLC ("BRC"), John Ryan Bays, Ramora Builders, LLC ("Ramora"), and James Bays alleging copyright infringement of numerous architectural works. Dkt. 1

1 On November 7, 2014, Northwest filed an amended complaint against the same  
2 defendants adding allegations that they also infringed the copyrights by including the  
3 works in advertisements. Dkt. 14.

4 On February 26, 2015, the Court issued a scheduling order setting April 8, 2015,  
5 as the deadline for filing amended pleadings. Dkt. 21.

6 On January 21, 2016, BRC and John Ryan Bays (“Defendants”) filed a motion for  
7 summary judgment. Dkt. 44.

8 On February 18, 2016, Northwest filed a motion for leave to file a second  
9 amended complaint. Dkt. 58. In the proposed second amended complaint, Northwest  
10 withdraws claims based on numerous works and proposes new claims based on newly  
11 disclosed works. *Id.*, Exh. 1. On February 29, 2016, Defendants responded arguing that  
12 the proposed withdrawn claims should be dismissed with prejudice and that the Court  
13 should award Defendants reasonable attorney’s fees and costs for defending these claims.  
14 Dkt. 66. On March 4, 2016, Northwest replied and sought to add a claim based on an  
15 additional work that was not in the proposed complaint (“Plan 2648-C9-1 Claim”). Dkt.  
16 68. On March 9, 2016, Defendants filed a surreply requesting the Court strike the Plan  
17 2648-C9-1 Claim. Dkt. 76.

18 On March 10, 2016, Northwest filed a supplemental motion for leave to file a  
19 second amended complaint seeking to add the Plan 2648-C9-1 Claim.<sup>1</sup> Dkt. 78. On  
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<sup>1</sup> Based on this motion, the Court denies Defendants’ motion to strike as moot.

1 March 21, 2016, Defendants responded. Dkt. 80. On March 25, 2016, Northwest  
2 replied. Dkt. 83.

3 As these motions were pending and trial drew near, the parties and the retained  
4 mediator informed the Court that settlement was likely. Although Northwest's claims  
5 against Ramora and John Bays were dismissed with prejudice, Dkt. 87, the matter was  
6 not settled. The Court struck the pretrial conference and the trial date. Dkt. 88.

7 On May 12, 2016, Defendants' attorney moved to withdraw from representation  
8 asserting that Defendants have failed "to pay for legal services rendered in this case."  
9 Dkts. 89, 90. On May 31, 2016, the Court granted the motion and renoted the pending  
10 motions so that the remaining corporate defendant could obtain counsel. Dkts. 92–94.  
11 On July 5, 2016, attorney Dan Bridges appeared on behalf of Defendants. Dkt. 97.

## 12 II. DISCUSSION

### 13 A. Good Cause

14 A party seeking to amend its pleading after the date specified in the scheduling  
15 order must first show "good cause" for amendment under Rule 16(b). *Johnson v.*  
16 *Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). This standard "primarily  
17 considers the diligence of the party seeking the amendment." *Coleman v. Quaker Oats*  
18 *Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000) (citing *Johnson*, 975 F.2d at 609).

19 In this case, Defendants argue that Northwest has failed to show good cause for  
20 the tardy amendments. Dkt. 66 at 7–8. Northwest counters that Defendants failed to  
21 timely respond to discovery and, when Northwest finally received the requested  
22 information, timely notified Defendants of the possibility of dismissing claims. Dkt. 68

1 at 3–4. Northwest also contends that, instead of waiting for Northwest to fully review the  
2 discovery, Defendants filed the motion for summary judgment almost two months before  
3 the deadline and after Northwest moved the Court for an extension of pending deadlines  
4 to have sufficient time to narrow the issues for trial. Dkt. 58 at 3 (citing Dkt. 31). The  
5 Court finds that Northwest has shown good cause because it diligently informed opposing  
6 parties and the Court of its intention to voluntarily dismiss some claims.

7 **B. Leave to Amend**

8 If “good cause” is shown, the party must demonstrate that amendment is proper  
9 under Rule 15. *Johnson*, 975 F.2d at 608. Although Northwest seeks leave to amend in  
10 its original motion, Northwest actually seeks leave to voluntarily dismiss claims under  
11 Rule 41. Pursuant to the rule, the Court must make three separate determinations: (1)  
12 whether to allow dismissal; (2) whether the dismissal should be with or without  
13 prejudice; and (3) what terms and conditions, if any, should be imposed. *See Burnette v.*  
14 *Godshall*, 828 F. Supp. 1439, 1443 (N.D. Cal. 1993), *aff’d sub nom. Burnette v. Lockheed*  
15 *Missiles & Space Co.*, 72 F.3d 766, 767 (9th Cir. 1995).

16 In this case, Defendants only contest the last two factors. Thus, the Court will  
17 allow dismissal and consider the other factors.

18 **1. With or Without Prejudice**

19 “Whether to allow dismissal with or without prejudice is discretionary with the  
20 court, and it may order the dismissal to be with prejudice where it would be inequitable  
21 or prejudicial to defendant to allow plaintiff to refile the action.” *Burnette*, 828 F. Supp.  
22 at 1443. The following factors are relevant in determining whether the dismissal should

1 be with or without prejudice: (1) the defendant's effort and expense involved in preparing  
2 for trial, (2) excessive delay and lack of diligence on the part of the plaintiff in  
3 prosecuting the action, and (3) insufficient explanation of the need to take a dismissal.  
4 *Id.* (quotation omitted).

5 In this case, all of these factors weigh in favor of Northwest. First, Northwest  
6 informed Defendants and the Court of its intention to voluntarily dismiss some of its  
7 claims *before* Defendants filed their early motion for summary judgment. Any expenses  
8 incurred in preparing that motion could have been easily avoided. Moreover, the  
9 discovery dispute delayed Northwest's ability to fully evaluate the merits of its claims.

10 Second, Defendants have failed to show that Northwest engaged in any  
11 unreasonable delay, let alone excessive delay. Defendants have also failed to show that  
12 Northwest lacked diligence.

13 Third, Northwest has provided a sufficient explanation for the need to take  
14 dismissal in that it intends to narrow the issues for trial. Moreover, if Northwest refiles  
15 the dismissed claims, then Defendants may use the previously prepared material to  
16 defend these claims. Therefore, the Court concludes that Northwest may voluntarily  
17 dismiss its claims without prejudice.

## 18 **2. Terms**

19 "We have explicitly stated that the expense incurred in defending against a lawsuit  
20 does not amount to legal prejudice." *Westlands Water Dist. v. United States*, 100 F.3d  
21 94, 97 (9th Cir. 1996) (citing *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143,  
22 146 (9th Cir. 1982)). "The defendants' interests can be protected by conditioning the

1 dismissal without prejudice upon the payment of appropriate costs and attorney fees.” *Id.*  
 2 “Imposition of costs and fees as a condition for dismissing without prejudice is not  
 3 mandatory however.” *Id.* (citing *Stevedoring Servs. of Am. v. Armilla Int’l B.V.*, 889 F.2d  
 4 919, 921 (9th Cir. 1989)).

5 In this case, Defendants request an award of fees and costs for defending against  
 6 the withdrawn claims. Dkt. 66 at 11–12. Specifically, Defendants assert that they  
 7 “incurred significant expense in preparing an expert report and summary judgment  
 8 motion addressing all of the infringement allegations in the [first amended complaint]  
 9 . . . .” *Id.* The Court has already found that Defendants unnecessarily incurred the fees  
 10 and costs for the summary judgment motion. With regard to the expert report, at least  
 11 some of the costs for this expert could have been avoided because it appears that the  
 12 expert was in the middle of preparing his report when Northwest informed the parties that  
 13 it intended to withdraw some claims. *See* Dkt. 47, Declaration of Eric Lindberg, ¶¶ 43–  
 14 44 (By December 10, 2015, the date that Northwest filed its motion to continue, the  
 15 expert had undertaken review of the claims). In light of Defendants’ decision to charge  
 16 ahead with litigation despite Northwest’s attempt to narrow the issues, the Court finds  
 17 that the imposition of fees and costs is inappropriate. Therefore, the Court denies  
 18 Defendants’ request for costs and fees.

### 19 **C. Supplemental Leave to Amend**

20 At this point of the proceeding, a pleading may only be amended with the  
 21 opposing party’s consent or with the court’s leave. Fed. R. Civ. P. 15(a)(2). Courts  
 22 should “freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). As a matter

1 of policy, motions for leave to amend should be granted with “extreme liberality.” *Moss*  
2 *v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009). When leave to amend is sought  
3 after service of a responsive pleading, the motion should be granted “unless amendment  
4 would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates  
5 undue delay.” *Johnson*, 975 F.2d at 607.

6 In this case, Defendants argue that Northwest’s request to add claims is  
7 “extraordinarily prejudicial to [Defendants] and would completely derail the scheduling  
8 track for the scores of other claims that are ready for trial.” Dkt. 80 at 2. At the time  
9 Defendants filed their motion, Defendants’ argument was meritorious because trial was  
10 imminent. At this point, however, the Court has struck the trial date and has yet to issue  
11 a new scheduling order. Thus, there is no prejudice in granting leave to add additional,  
12 apparently valid claims. The Court grants the motions on this issue.

### 13 III. ORDER

14 Therefore, it is hereby **ORDERED** that Northwest’s motion for leave to file  
15 second amended complaint (Dkt. 58) and supplemental motion for leave to file second  
16 amended complaint (Dkt. 78) are **GRANTED**. Northwest shall file the Second Amended  
17 Complaint as a separate entry on the electronic docket no later than September 2, 2016.

18 Dated this 29th day of August, 2016.

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21 BENJAMIN H. SETTLE  
22 United States District Judge